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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 256.

MARY S. WHITMORE, ROBERT SIMPSON, LOUISE FILLEBROWN MURTAUGH AND SUE M. STROUS, EXECUTRICES OF THE ESTATE OF HENRY ROSE, DECEASED; EDWARD L. McKENZIE, PEOPLES PITTSBURGH TRUST COMPANY, EXECUTOR OF THE ESTATE OF C. LOUIS McKENZIE, DECEASED; FAYETTE A. McKENZIE, JOHN SIMPSON AND LILLY S. CULVER, THE NEXT-OF-KIN OF MARION S. SIEMENS, DECEASED;

Petitioners,

vs.

THE PENNSYLVANIA SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, a Corporation,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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vs.

THE PENNSYLVANIA SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, A CORPORATION, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

OPINIONS OF THE COURTS BELOW.

The opinion of the Supreme Court of Pennsylvania affirming the decree of the Orphans' Court of Tioga County is reported in 346 Pa. 610. It is dated March 22, 1943.

The adjudication and opinion of the Orphans' Court of Tioga County, dated March 14, 1942, is unreported. It appears at page 331a of the record.

The opinion of the Orphans' Court of Tioga County on the petitioners' motion to open the adjudication is unreported and appears at page 365a of the record.

The opinion of the Orphans' Court of Tioga County on the petitioners' exceptions to the adjudication is unreported and appears at page 442a of the record.

The final decree of the Orphans' Court of Tioga County awarding distribution is dated July 13, 1942, and appears at page 460a of the record.

The opinion of the Orphans' Court of Tioga County dismissing the petitioners' petition for declaratory judgment is dated November 15, 1941, and is reported in 42 Penna. D. & C. Reports, page 708.

JURISDICTION.

The opinion of the Supreme Court of Pennsylvania was filed March 22, 1943, and the petition for rehearing was filed by the petitioners March 30, 1943, and was denied April 19, 1943.

On the application of the petitioners an order was entered by this Court on June 23, 1943, extending until August 18, 1943, the time within which the petition for certiorari might be filed.

Jurisdiction of this Court is claimed by the petitioners under Sec. 237 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. 344 (b)).

STATEMENT OF THE CASE.

Marion S. Siemens, a widow, died a resident of Wellsboro, Tioga County, Pennsylvania, on October 26, 1939 (R. 331a), leaving as her next of kin certain cousins. By her will, dated September 22, 1936 (R. 10a), and by three codicils, one undated (R. 19a), and the others dated February 1, 1937 (R. 18a) and October 23, 1939 (R. 20a), respectively, she appointed Charles G. Webb, Esq., of Wellsboro, and the Girard Trust Company of Philadelphia executors. After making certain charitable bequests she bequeathed to relatives and others a total of over $200,000., and then bequeathed the residue of her estate to "the Penna. S.P.C.A.; requesting that they give all the attention possible to work in Tioga Co."

Her will was probated November 6, 1939. The executors filed their first and partial account October 26, 1940. It was confirmed *nisi* November 25, 1940, and finally December 9, 1940.

The Orphans' Court of Tioga County appointed Frank S. Hughes, Esq., auditor January 27, 1941. He filed his report March 8, 1941. It was confirmed *nisi* March 10, 1941, and finally March 22, 1941 (Docket entries, R. 3a).

On July 31, 1941, some of the next of kin filed in the Orphans' Court a petition for a declaratory judgment to construe the will (R. 181a), alleging that there is a patent ambiguity upon the face of the will in that it fails to designate with the certainty required any object for the residuary estate. They asked that the

will be declared void as to the residuary estate and that the testatrix be declared to have died intestate as to her residuary estate.

Answers in the nature of demurrers were filed, raising questions of law and alleging that there was no proper subject for a declaratory judgment, and that the question of who was entitled to the residuary estate was ripe for determination by the Auditing Judge upon the audit of the executors' account.

The Orphans' Court filed an opinion November 15, 1941 (R. 234a), dismissing the petition for the declaratory judgment.

On October 25, 1941, the second and final account of the executors was filed, which was confirmed *nisi* November 24, 1941, and finally December 13, 1941.

On December 20, 1941, some of the next of kin filed a petition asking that the Orphans' Court fix a date for the hearing and determination of the rights of all persons entitled to share in the distribution of the residuary estate (R. 243a).

The hearing was held January 29, 1942, before Honorable Thomas A. Crichton, President Judge of the Orphans' Court (R. 248a).

At the hearing the respondent filed a formal claim to the residuary estate (R. 252a), alleging that it was the corporation named as the residuary legatee in the will.

The respondent urged that the Court should take judicial notice of the meaning of the abbreviation used by the testatrix "the Penna. S.P.C.A."

The respondent also offered substantial testimony and evidence as to its identity. The respondent also urged that under the law of Pennsylvania, irrespective of whether the respondent had established its identity as the residuary legatee, the next of kin had no standing to claim the residuary estate as the abbreviation S.P.C.A. clearly meant some charity, and a bequest to a charity would not be allowed to fail for want of a trustee.

The next of kin offered evidence to prove their relationship to the testatrix, but offered no further evidence, and their counsel stated that they had no further evidence to offer (R. 308a).

On March 14, 1942, the Orphans' Court filed its adjudication consisting of an opinion, findings of fact and conclusions of law (R. 331a-352a), finding as a fact (No. 9, R. 333a) that the decedent died testate as to her residuary estate bequeathing it to the Pennsylvania Society for the Prevention of Cruelty to Animals, the claimant there and the respondent here.

The Orphans' Court also filed a conclusion of law that the residuary estate should be awarded to the Respondent (R. 352a), and on March 14, 1942, ordered a schedule of distribution to be submitted on behalf of the executors.

On March 17, 1942, the next of kin filed a petition to cancel and annul the adjudication (R. 358a). It was refused March 28, 1942 (R. 368a).

A motion by the next of kin to set aside the adjudication (R. 369a) was overruled March 30, 1942 (R. 370a).

On March 30, 1942, the Orphans' Court confirmed the schedule of distribution *nisi,* making minor corrections.

On petition filed by the executors to correct certain figures (R. 377a) an amended decree *nisi* was entered April 27, 1942 (R. 393a).

On May 8 and 11, 1942, the next of kin filed exceptions to the adjudication (R. 395a, 397a), and on May 29, 1942, a motion to open the adjudication and additional exceptions (R. 439a).

The additional exceptions being allowed (R. 441a), the Orphans' Court on July 13, 1942, filed an opinion modifying certain findings, immaterial to the matter here involved (R. 442a), and entered a final decree confirming the adjudication and schedule of distribution as thus modified (R. 460a).

The next of kin appealed to the Supreme Court of Pennsylvania which affirmed the decree of the Orphans' Court.

The decedent, Marion S. Siemens, had executed a deed of trust, dated November 30, 1936, transferring to trustees certain securities in trust to pay the net income to her for life, and upon her death to pay over and distribute the principal to such persons as she by her last will and testament should direct, limit and appoint (R. 13a).

After her death the surviving trustee and the executors of a deceased trustee filed their account in the Orphans' Court of Philadelphia County, and that Court on December 6, 1939, awarded the balance to Mrs. Siemens' executors, to be segregated from her

individual estate and accounted for by them as a separate fund. The Orphans' Court held that this trust fund passed under her will as a part of her estate. This holding was made in an opinion filed on motion of the next of kin to open the adjudication (R. 367a).

ARGUMENT.

SUMMARY.

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1. The Proceedings in the Orphans' Court of Tioga County.

(*a*) The Executors' First Account.

(*b*) The Executors' Second Account.

(*c*) The Assertion of the Claim by the Next of Kin.

(*d*) The Hearing Held on the Petition of the Next of Kin.

(*e*) The Claims of the Petitioners and of the Respondent at the Hearing and the Decision of the Court Thereon.

2. The Petitioners Had Full Opportunity to be Heard in the Orphans' Court.

3. The Orphans' Court and the Supreme Court of Pennsylvania Correctly Construed the Will.

4. No Federal Question is Presented.

5. Errors in Petitioners' Summary Statement of Facts.

6. Conclusion.

1. The Proceedings in the Orphans' Court of Tioga County.

In Pennsylvania jurisdiction over the estates of decedents and the accounts of executors is in the Orphans' Court. Act of June 7, 1917, Pamphlet Laws, 366, Section 9 (e) and (l). The Act provides that the jurisdiction of the Orphans' Court shall extend to and embrace:

> "(e) The distribution of the assets and surplusage of the estates of decedents among creditors and others interested; * * *
>
> (l) All cases within their respective counties, wherein executors, administrators, guardians, or trustees may be possessed of, or are in any way accountable for, any real or personal estate of the decedent;"

In the larger counties there are separate Orphans' Courts. In the smaller counties the Orphans' Court is held by the judge or judges of the Court of Common Pleas.

In Tioga County there is only one judge and he holds the Orphans' Court.

Accounts of executors are filed with the Register of Wills and notice of the filing given by advertisement. The notice states that the accounts will be presented to the Orphans' Court for confirmation at a certain time and place.

It is the practice in Tioga County, there being no separate Orphans' Court, for the Court to confirm all accounts if no exceptions are filed, and if desirable then to appoint an auditor to make distribution.

(*a*) THE EXECUTORS' FIRST ACCOUNT.

The docket entries (R. 2a) show that the executors' first and partial account, filed October 26, 1940, was referred to an auditor on December 14, 1940, the order appearing in the record at page 58a.

The auditor held extensive hearings, reported that partial distribution should be made, recommended the payment of the pecuniary legacies and certain claims, and ordered that the balance remain in the hands of the executors (R. 169a).

The docket entries (R. 3a) show that on July 31, 1941, the next of kin, the petitioners here, filed their petition for a declaratory judgment (R. 181a), which was dismissed (R. 242a) on the ground that the questions raised should be decided in the usual manner as provided by statute upon the audit of the final account (R. 242a).

(*b*) THE EXECUTORS' SECOND ACCOUNT.

In the following November (R. 4a) the executors filed their second and final account which was confirmed.

(*c*) THE ASSERTION OF THE CLAIM BY THE NEXT OF KIN.

On December 20, 1941 (R. 4a), the petitioners filed their petition for a hearing (R. 243a) asking the Orphans' Court to determine the rights of all persons entitled to share in the distribution of the residuary estate.

(*d*) The Hearing Held on the Petition of the Next of Kin.

Pursuant to this petition the Court on December 20, 1941 (R. 246a) entered a decree fixing the hearing for January 22, 1942, and ordering publication of the notice. The time for the hearing was changed to January 29, 1942 (R. 5a).

The proceedings before the auditor with reference to the first and partial account of the executors having to do only with questions relating to the pecuniary legacies and miscellaneous questions not involving the distribution of the residuary estate, all questions concerning the disposition of the residuary estate were before the Court at the hearing on January 29. Counsel appeared for the next of kin and testimony was taken to establish their relationship (R. 249a).

(*e*) The Claims of Petitioners and of the Respondent at the Hearing and the Decision of the Court Thereon.

The next of kin of the decedent, the petitioners here, claimed in the Orphans' Court that the residuary clause of the will contained a patent ambiguity. This claim of necessity amounted to an assertion that the abbreviation "the Penna. S.P.C.A." is meaningless and that as it is impossible to ascertain what it does mean, the Court should declare the residuary bequest void for uncertainty, find that the decedent died intestate as to her residuary estate, and that it descended to her next of kin under the intestate laws.

They offered no evidence as to the meaning of the residuary clause of the will or to rebut the evidence offered by the respondent, although they had full opportunity to do so.

The respondent filed a formal claim to the residuary estate setting forth that it was incorporated by the Act of April 4, 1868, Pamphlet Laws, 655, under the name of the Pennsylvania Society for the Prevention of Cruelty to Animals, and that it is well and widely known by the abbreviation "Penna. S.P.C.A." At the hearing the respondent presented three propositions:

1. That the Court should take judicial notice of the meaning of the abbreviation.

2. That the proof submitted established the identity of the respondent as the residuary legatee.

3. That even if judicial notice of the meaning of the abbreviation were not taken, and even if the proof as to the respondent's identity were not conclusive, nevertheless the next of kin had no standing to claim the residuary estate once it was admitted that the abbreviation "S.P.C.A." meant some society for the prevention of cruelty to animals.

The third proposition was based on the Pennsylvania law that a gift to charity will not be permitted to fail for want of a trustee and on the fact that the courts of Massachusetts, California, New York

and New Jersey, and the lower courts of Pennsylvania had held that a gift to a society for the care of animals is a charity. That such a society is a charity:

Massachusetts Society for the Prevention of Cruelty to Animals v. *City of Boston, 142 Mass. 24 (6 N. E. 840);*
Minns v. *Billing, 183 Mass. 126 (66 N. E. 593, 5 L. R. A. N. S. 686);*
Coleman's Estate, 167 Cal. 212 (138 Pac. 992);
Title Guarantee & Trust Company (Hamilton's Will), 165 N. Y. Supp. 71;
Pitney v. *Bugbee, 98 N. J. L. 116 (118 Atl. 780);*
Lockhart's Estate, 21 Pa. D. & C. 598;
Ammon's Estate, 72 Pitts. (Pa.) L. J. 872.

That a charity can never fail either because it is indefinite or for want of a trustee:

Hunter's Estate, 279 Pa. 349;
Thompson's Estate, 282 Pa. 30;
Darlington's Estate, 289 Pa. 297;
Mears's Estate, 299 Pa. 217.

While not devoting much of its opinion to this third proposition the Orphans' Court agreed with it.

At the hearing in the Orphans' Court the respondent offered in evidence various encyclopedias, dictionaries and reference works, in all of which the abbreviation "S.P.C.A." was defined as meaning Society for the Prevention of Cruelty to Animals (R. 294a).

They were offered not only to inform the mind of the Court and to assist the Court in taking judicial notice of the abbreviation, but as affirmative proof of the respondent's identity.

The respondent also offered other proof of its identity, being photographs, signs, badges and newspaper clippings, showing that it was known by the abbreviation "Penna. S.P.C.A." (R. 267a-293a). These were as follows:

Exhibit 1. Photograph of a lamp-post in front of the respondent's former building, marked "S.P.C.A."
Identified R. 270a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 2. Photograph of front of respondent's present headquarters in 1917, marked "The Penna. S.P.C.A."
Identified R. 271a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 3. Photograph of respondent's water truck, marked "The Penna. S.P.C.A."
Identified R. 271a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 4. Photograph of respondent's water truck, marked "The Penna. Society P.C.A."
Identified R. 271a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 5. Photograph of respondent's horsedrawn truck, marked "The Penna. Society P.C.A."
Identified R. 271a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 6. Photograph of respondent's three Ford cars, marked "The Pennsylvania S.P. C.A."
Identified R. 272a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 7. Photograph of respondent's animal ambulance, marked "The Pennsylvania S.P.C.A."
Identified R. 272a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 8. Photograph of respondent's former headquarters, marked "Penna. Society P.C.A."
Identified R. 272a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 9. Photograph of respondent's water truck, marked "The Penna. S.P.C.A."
Identified R. 273a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 10. Photograph of sign at respondent's clinic, marked "The Pennsylvania S.P.C.A."
Identified R. 273a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 11. Photograph of sign in passageway to respondent's clinic, marked "The Penna. S.P.C.A."
Identified R. 273a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 12. Photograph of Directory Board at respondent's headquarters, marked "The Pennsylvania S.P.C.A."
Identified R. 273a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 13. Photograph of three animal ambulances, marked "The Pennsylvania S.P.C.A."
Identified R. 274a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 14. Photograph of respondent's animal ambulance, marked "The Pennsylvania S.P.C.A."
Identified R. 274a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 17. Respondent's metal sign for use on buildings where animals are housed, marked "Penna. S.P.C.A."
Identified R. 280a. Offered R. 280a. Admitted R. 280a.

Exhibit 20. Uniform cap used by respondent's drivers, marked "Penna. Society P.C.A."
Identified R. 287a. Offered R. 287a. Admitted R. 287a.

Exhibit 22. 2 volumes of newspaper clippings showing the respondent frequently referred to as "The Penna. S.P.C.A."
Identified R. 291a. Offered R. 292a. Admitted R. 292a.

8 dictionaries, encyclopedias and reference works, defining S.P.C.A. as meaning "Society for the Prevention of Cruelty to Animals."
Offered R. 294a. Admitted R. 297a.

They are referred to in detail in the adjudication of the Orphans' Court (R. 348a, 349a).

The next of kin, all of whom were there represented by counsel, offered no evidence as to the meaning of the abbreviation or on any other subject except their relationship to the testatrix, and at the conclusion of the hearing it was definitely stated by their counsel: *"We have no more evidence"* (R. 308a). Their counsel made an elaborate argument endeavoring to convince the court that the will contained a patent ambiguity. The record of the hearing on January 29, 1942 (R. 308a), shows that at the conclusion of the testimony and argument it was closed. Shortly afterwards further hearings were held for the purpose of admitting a deposition as to certain of the next of kin, and to permit the executors to make a statement about taxes (R. 308a and 316a). At this hearing counsel for the petitioners stated that he would like to have his appearance for an additional party noted and get it in the record "while it is open," thus evidencing his realization that the hearing was being closed (R. 317a).

Although the usual practice in the Orphans' Court is for the losing party to file exceptions to the adjudication, the next of kin first filed a petition to annul the adjudication (R. 358a) and when this was refused (R. 368a) filed a motion to set it aside, which also was refused (R. 370a). *It was in this petition to annul the adjudication that, for the first time, the petitioners alleged that they had not had an opportunity to offer*

evidence as to the meaning of the residuary clause of the will (R. 361a).

They then filed 109 exceptions to the adjudication, and later 5 more, or 114 in all (R. 397a-441a). The Court modified certain of its findings, immaterial here, dismissed the exceptions, and confirmed finally the adjudication on July 13, 1942 (R. 460a).

On appeal to the Supreme Court of Pennsylvania by the next of kin that Court held that the Orphans' Court was justified in taking judicial notice of the meaning of the abbreviation, and affirmed the decree awarding the residuary estate to the respondent (346 Pa. 610).

2. The Petitioners Had Full Opportunity to be Heard in the Orphans' Court.

The next of kin had a full and fair hearing in the Orphans' Court. The Court, of its own volition, might have taken judicial notice of the meaning of the abbreviated corporate name of the respondent. But the respondent offered evidence of the meaning of the abbreviation and affirmative proof of the respondent's identity.

Insofar as the dictionaries, encyclopedias and reference books, to which the Court was referred, are concerned, they were offered in evidence and were physically present at the hearing and were available to the petitioners. They were not withheld from the record. Compare *Ohio Bell Telephone Co.* v. *Commissioner, 301 U. S. 292, p. 301.*

The badges, labels, photographs and newspaper clippings offered to prove that the respondent frequently is known by the abbreviation "The Penna. S.P.C.A." were offered in evidence, were physically in Court, were available to the next of kin, and are Exhibits in this case. Every requirement of due process of law was observed by the Orphans' Court. They had a full opportunity to be heard, not only before a decree was entered (*Wilson* v. *Standefer, 184 U. S. 399, p. 415*), but at the same time as the respondent's claim was heard, and at the time set on their own petition for a hearing of their case. The proceedings which the petitioners invoked were conducted according to the law of Pennsylvania and the rules of the Court in which the hearing was held. *Thompson* v. *Nichols, 254 Fed. 973, p. 986.*

No federal question was raised by the petitioners at the hearing or thereafter, until they came to file exceptions to the Court's adjudication. Out of 114 exceptions filed, 2 raised the question of due process of law, Nos. 100 and 101 (R. 435a-436a).

In the Supreme Court of Pennsylvania the petitioners filed 58 assignments of error, in only one or possibly two of which was the issue of due process of law raised.

The Orphans' Court of Tioga County in passing upon the petitioners' motion to open the adjudication (R. 366a) said:

> "Furthermore, the next of kin had every opportunity to offer evidence in support of their

claims. Evidence to show the intent of testatrix would have been rejected if offered, but the forum was open to them for that purpose if they cared to do so. It was clearly understood at the close of the hearing that all evidence was in, although later, and before the filing of the adjudication, it was opened to allow these petitioners to present further testimony as to their identity. Without averring the existence of newly discovered admissible evidence they now seek to open again for the apparent purpose of showing intent, although they strenuously contended at the argument that such testimony is inadmissible. We agreed with them then, and have not changed our opinion.

It would be an anomaly indeed were we to decide, as we have, that the meaning of the will is obtainable from its face, and then proceed to open an adjudication based on that meaning for the purpose of admitting testimony to show that testatrix did not mean what we found she said."

And in overruling the exceptions of the petitioners (R. 447a), the Court said:

"Exceptants had every opportunity at the hearing to offer any evidence that they deemed pertinent. Instead of doing so they objected to the admission of evidence by any claimant on the ground that there is in the will a patent ambiguity. (See page 7 of notes of testimony.) It was not until after the adjudication had been made that these exceptants petitioned the court

to open the matter and allow them to offer evidence on the question of identity of the Society claimant, founding the petition upon the untenable proposition that they were not bound to offer evidence until the court had determined that it would take judicial notice of the meaning of the term "Penna. S.P.C.A." We believe the petition was properly refused."

3. The Orphans' Court and the Supreme Court Correctly Construed the Will.

Text books and state and federal decisions sustain the right of a court to take judicial notice of abbreviations and other subjects:

> "Another common class of instances, subject to the foregoing general considerations * * * is that of the meanings of words and phrases and written symbols. So far as these are notorious and unquestioned, they are constantly found noticed."
>
> *Wigmore, Evidence, Third Edition, Volume IX, Section 2582.*

Gilman v. *Sheets, 78 Iowa 499 (43 N. W. 299);* judicial notice taken that "Dauphin Co., Pa." meant "Dauphin County, Pennsylvania."

Nix v. *Hedden, 149 U. S. 304;* judicial notice taken, after reference to a dictionary, that tomatoes are vegetables, not fruits.

Brown v. *Piper, 91 U. S. 37, p. 42;* judicial notice taken as to a freezing process in a claim to a patent for preserving fish and meats.

And several state and federal decisions are illustrative of proof being received to identify a legatee where the description in the will is slightly different from the corporate title:

Kimmel v. *Wagner, 1 Walker (Pa.) 191;* a devise to the "German Eldership" awarded to "The German Eldership of the Church of God."

Newell's Appeal, 24 Pa. 197; a devise "To the trustees, or those who hold the funds of the Theological Seminary at Princeton, State of New Jersey" awarded to the "Trustees of the Theological Seminary of the Presbyterian Church."

State Trust Company v. *Pierce, 126 Maine 67 (136 Atl. 289);* a bequest to "The Maine State Society for the Prevention of Cruelty to Animals, which Society is located at Portland, Maine" awarded to "The Maine State Society for the Protection of Animals."

Speer v. *Colbert, 200 U. S. 130, p. 142;* a bequest to "University of Georgetown" awarded to "The President and Directors of Georgetown College."

4. No Federal Question is Presented.

The Orphans' Court and the Supreme Court of Pennsylvania proceeded, in accordance with the state laws and practice, to construe the decedent's will. At the hearing the petitioners were represented by

counsel. After a full hearing the Pennsylvania Courts awarded the residuary estate to the respondent. Even if this decision were wrong, no Federal question is present:

Arrowsmith v. *Harmoning, 118 U. S. 194;*
Central Land Company v. *Laidley, 159 U. S. 103, p. 112;*
Iowa Central Railway Company v. *Iowa, 160 U. S. 389, pp. 393-394;*
American Railway Express v. *Kentucky, 273 U. S. 269, p. 273.*

5. Errors in Petitioners' Summary Statement of Facts.

The claim of the petitioners to their right to be heard in this court is based solely upon their allegation that they were denied a full and fair hearing and deprived of an opportunity to introduce evidence on their behalf. The entire record shows the contrary.

Many of the statements in the petition are erroneous and carry a false implication. The following are examples:

(*a*) On page 7 of the petition it is stated:

"When the court announced it would consider evidence, petitioners then asked to be permitted to put in evidence on their behalf and in rebuttal (without petitioners abandoning the rights reserved on their exceptions that no evidence was admissible as the ambiguity here involved was *patent*)."

The implication from this statement is that at the hearing, which was held for the purpose of receiving all evidence to be offered by the parties, the petitioners asked and were not permitted to introduce evidence as to the meaning of the residuary clause. The record shows the contrary. At the conclusion of the hearing, counsel for the petitioners stated:

"We have no more evidence" (R. 308a);

and at a subsequent hearing held for the purpose of permitting the executors to make a statement relative to taxes, counsel for the petitioners, stating that he appeared for John Simpson and that he wished that to be noted, referred to the fact that he would like to have his appearance

"in the record while it is open."

It was not until after the court's adjudication, opinion and findings had been filed that any question was raised by the petitioners as to the introduction of evidence with respect to the meaning of the residuary clause of the will. This question was raised for the first time in the irregular proceedings taken by the petitioners when they filed their petition to annul the adjudication (R. 361a).

(*b*) On page 7 of the petition, it is said:

"The Orphans' Court refused to allow petitioners to put in any evidence on the ground that any

> evidence concerning this ambiguity was inadmissible (R. 366a) (ostensibly because the ambiguity was patent) and *thereupon ruled that the court would judicially notice that the abbreviation meant respondent* (R. 366a)."

This statement is incorrect. As above set forth, it was not until after the hearing had been closed and the adjudication and opinion filed that the petitioners belatedly indicated their desire to introduce any evidence concerning the residuary clause of the will. Moreover, the court did not "thereupon" rule that judicial notice would be taken of the meaning of the abbreviation. This ruling was made *before* the petition to annul was filed and is set forth fully in the adjudication (R. 331a).

(*c*) Again, it is said on page 7 of the petition:

> "Petitioners' position was, that until the court ruled whether any evidence would be received, they would withhold all evidence concerning the ambiguous residuary clause."

There is not the slightest indication in the notes of testimony of the hearing showing that this was the petitioners' position. They refer to pages 359a, 360a and 361a of the record, which pages refer, not to any position they took at the hearing before the Orphans' Court, but to allegations in their petition to annul the adjudication filed *after* the court had decided the case.

(*d*) It is further said, on page 7:

> "Without announcing any ruling on the reserved question, the Orphans Court filed its findings of fact, conclusions of law and a decree, awarding nisi the residue of the estate, including in that residue the trust estate of the decedent, to the respondent."

An examination of the notes of testimony at the hearing (R. 248a) shows no question reserved by the court, except the right to strike out evidence received which the court might later determine to be inadmissible.

(*e*) On page 8 it is stated that the petitioners, in their petition to annul the adjudication and reopen the hearings, "pointed out" to the court that the evidence offered by the respondent had been received "provisionally" at the "preliminary hearing," and that the petitioners had not been advised of the court's ruling on the "reserved question of law." The hearing was not "preliminary," but was the one and only hearing held for the purpose of receiving any and all evidence that any party or claimant desired to offer. The respondent's evidence was not received "provisionally," nor did the petitioners refrain from offering evidence because the hearing was "preliminary" or because the respondent's evidence was offered "provisionally."

(*f*) On page 6, it is said that the Orphans' Court dismissed the application of the petitioners for a

declaratory judgment, but that in doing so, it recognized that the residuary clause was ambiguous. There is nothing in the record to show that in those proceedings the court in any way indicated that the residuary clause of the will was ambiguous.

(*g*) In the second paragraph, page 6, it is said that at the hearing "the judge * * * and the respondent" agreed with each other that there was nothing in the will upon which to predicate a charitable use. The record fails to disclose any such "agreement" or any statement either by the judge or the respondent to that effect.

These are but examples. Some of the erroneous statements are repeated in other parts of the petition. In view of what the record shows and the full opportunity afforded to the petitioners to present at the hearing any evidence that they desired, it is difficult to understand an allegation such as that contained on page 16, paragraph 2, that they were deprived of due process of law because the case was decided against them "without their ever having the opportunity to present their evidence."

6. Conclusion.

It is obvious that no federal ground adequate to support the petition exists, the construction of the will being a local question and the decision of the court being on the construction of that will.

Compare *Bilby* v. *Stewart, 246 U. S. 255, p. 257.*

The petitioners chose not to offer any evidence at the hearing in the Orphans' Court to prove that the

abbreviation "the Penna. S.P.C.A." meant something other than the corporate title of the respondent. They were afforded every opportunity to do so. It may be assumed that the reason they did not was because they had no such evidence.

The action of the court in refusing to open the adjudication and to let them do so later does not raise a federal question.

American Surety Co. v. *Baldwin, 287 U. S. 156, p. 168.*

The respondent respectfully asks that the petition for a certiorari be denied.

Respectfully submitted,

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